HFW

# INSURANCE BULLETIN
JULY 2023

## In this Insurance Bulletin:


REGULATORY

- UK and EU sign memorandum of understanding on regulatory cooperation in financial services
- FCA publishes finalised insurance guidance on supporting customers in financial difficulty
- PRA insights into general insurance reserving and capital modelling: warning on inflation
- Greenwashing and insurance – EIOPA interim report

DISPUTES

- Whose liability is it anyway? – PA (GI) Ltd v Cigna Insurance Services (Europe) Ltd
- COVID-19 Coverage cases continue before the courts



**Editor**
**WILLIAM REDDIE**
Partner, London
**T** +44 (0)20 7264 8758
**E** william.reddie@hfw.com



**Co-editor**
**KATE AYRES**
Knowledge Counsel, London
**T** +44 (0)20 7264 8120
**E** kate.ayres@hfw.com

**DOMINIC PEREIRA**
ASSOCIATE, LONDON

**"Although the Memorandum indicates progress in bilateral relations, it is limited to outlining the nature of the cooperation between the jurisdictions."**

# REGULATORY

## UK and EU sign memorandum of understanding on regulatory cooperation in financial services

**Since the UK exited the EU, cooperation between the jurisdictions in respect of the financial services sector has understandably been limited. However, in a step forward, a memorandum of understanding (the Memorandum)[1] signed on 27 June 2023 sets out the framework for structured regulatory cooperation in financial services between the UK and the EU. It also establishes a bilateral forum to facilitate such cooperation and the discussion of relevant issues.**

Although the Memorandum indicates progress in bilateral relations, it is limited to outlining the nature of the cooperation between the jurisdictions – it does not impose any legal rights or obligations. In particular, the Memorandum does not make any commitments to granting the UK access to the EU's single market or equivalence between the UK and EU regulatory regimes.

### UK-EU relationship in financial services

The post-Brexit UK-EU relationship in financial services is based on the Trade and Co-operation Agreement signed in December 2020 and the parties' concurrent joint declarations (the Joint Declarations)[2], in which the UK and the EU agreed to establish a framework for structured regulatory cooperation under a memorandum of understanding. The ensuing negotiations resulted in the Memorandum.

The Memorandum refers to financial services as a whole, with no specific focus on (or mention of) the insurance sector.

### Regulatory cooperation

The Memorandum states that regulatory cooperation between the UK and the EU is based on a shared objective of preserving financial stability, market integrity and the protection of investors and consumers. The intent is that such cooperation will cover the following areas:

1. bilateral exchanges of views and analysis relating to regulatory developments and other issues of common interest;
2. transparency and appropriate dialogue in the process of adoption, suspension and withdrawal of equivalence decisions;
3. bilateral exchanges of views and analysis relating to market developments and financial stability issues; and
4. enhanced cooperation and coordination including in international bodies as appropriate.

In particular, the Memorandum highlights that the UK and the EU will endeavour to share information on regulatory developments to allow for a timely identification of potential cross-border implementation issues.

The Memorandum expressly states that it does not create rights or obligations under international or domestic law, and that there will be no financial obligations resulting from its implementation. The Memorandum also stipulates that regulatory cooperation should not restrict the ability of either jurisdiction to implement regulatory, supervisory or other legal measures that it considers appropriate.

### The forum

The Memorandum establishes the Joint EU-UK Financial Regulatory Forum (the Forum) to serve as an ongoing platform to facilitate dialogue between the UK and the EU on financial services issues of mutual interest.

The Forum is intended to take stock of progress, and to undertake forward planning, of regulatory cooperation. The Memorandum outlines the Forum's operational objectives and examples of its proposed activities, which are consistent with the wider objectives of the Memorandum (see above) and which generally focus on improving transparency (via

discussions, dialogue, exchanges of views and sharing of information) between the jurisdictions.

Participants at Forum meetings will be representatives from the governments and regulatory authorities of the UK, EU and EU member states, who may jointly invite "other relevant experts" to provide input on specific issues.

The Forum will meet at least semi-annually, with opportunities for dialogue between formal Forum meetings.

## The Memorandum – a "starting gun" for equivalence?

Although the UK and the EU committed in the Joint Declarations to discussing "*how to move forward on both sides with equivalence determinations*" in the Memorandum (as then envisaged), this was on the basis that any dialogue would be "*without prejudice to the unilateral and autonomous decision-making process of each side*".

The EU's reservation of its unilateral position on equivalence was repeated in a speech in 2021 by the EU's current commissioner for financial services, in which she indicated that the Memorandum (as then envisaged) "*is not about restoring market access rights that the UK has lost, nor will it constrain the EU's unilateral equivalence process*", and that the EU would only resume its unilateral equivalence assessments of the UK (which would be on the same criteria as all non-member states) once the Memorandum was agreed.[3]

The Memorandum maintains this approach, only committing the parties to "*transparency and appropriate dialogue*" in respect of any potential equivalence decisions and expressly reserving the unfettered ability of either jurisdiction to implement regulatory measures that it considers appropriate.

On this basis, it is unlikely that the Memorandum or upcoming Forum meetings will significantly accelerate any EU equivalence assessments of the UK financial services sector, particularly if the UK continues to seek divergence from the EU regulatory regime.

## Looking ahead

Firms should monitor for any opportunities to contribute their views in respect of Forum meetings (or any other meetings in the intervening periods) – as Forum participants, the Treasury, PRA and/or FCA may consult the financial services sector in anticipation of such meetings or even invite firms to attend meetings and provide input. The first Forum meeting is expected to take place in Autumn 2023.

**DOMINIC PEREIRA**
Associate, London
**T** 44 (0)20 7264 8194
**E** dominic.pereira@hfw.com

1. The final version of the memorandum of understanding can be accessed **here**.
2. The Joint Declarations can be accessed **here**.
3. The speech by Commissioner McGuinness can be accessed **here**.

# FCA publishes finalised insurance guidance on supporting customers in financial difficulty

**ALI MYNOTT**
ASSOCIATE, LONDON

**"The guidance states that the FCA expects a firm to take action where it identifies a customer in financial difficulty, including reducing, as far as possible, the risk of the customer losing insurance cover that is important to them."**

**Following its consultation paper and draft guidance in January 2023, the FCA has now published its Policy Statement (PS23/9) and finalised insurance guidance on supporting customers in financial difficulty. The guidance is in effect from 31 July 2023.**

Covering both retail and commercial customers (with the exception of policyholders of contacts of large risks), the guidance will form a part of the Insurance: Conduct of Business sourcebook (ICOBS) and will apply to all firms subject to this section of the FCA Handbook.

The publication of the guidance comes at a time where the FCA is heavily focussed on the prevention of customer harm and the challenges faced by firms and customers, including pressures from the increased cost of living.

In its Policy Statement, the FCA highlights that its recent report on the Financial Lives Survey had found that, in the 6 months to January 2023, 1 in 8 policyholders had cancelled or reduced the cover of one of their general insurance or protection policies. This suggests that customers are increasingly finding themselves in financial difficulty and making the decision to cut back on important insurance cover. Accordingly, the guidance is intended to provide better and more consistent protection for customers in financial difficulty across the non-investment insurance market, with the FCA stating that the guidance will complement, amongst other things, the Consumer Duty[1].

## The policy statement and guidance

The guidance states that the FCA expects a firm to take action where it identifies a customer in financial difficulty, including reducing, as far as possible, the risk of the customer losing insurance cover that is important to them. More generally, firms are expected to make sure that customers are aware of and understand the support available to them in the event they find themselves in financial difficulty. The guidance also sets out a non-exhaustive list of trigger points which may indicate to a firm that a customer is in financial difficulty, including customers missing payments or wanting to reduce their level of cover.

In its Policy Statement, the FCA points out that the guidance does not introduce new requirements on firms to take additional steps, or create new processes and systems, to identify customers in financial difficulty, and is instead intended to clarify the circumstances and trigger points where it expects firms to be able to identify such customers. It is also recognised that firms will not be able to identify all customers who are experiencing financial difficulty, and that, in distribution chains, some firms may have little to no contact with the customer. However, the FCA does expect firms in the distribution chain to work together, when appropriate, to support customers that have been identified as being or being likely to be in financial difficulty.

## Discussion

Whilst the guidance may have limited impact on firms' current processes and systems, we expect to see firms considering the guidance as part of their work to embed the Consumer Duty. In particular, as suggested in the Policy Statement, firms might want to consider reviewing standardised letters that go out to customers that have missed payments, to ensure that information on help and support for those that find themselves in financial difficulty is clear and accessible.

From the FCA's perspective, it explains in the Policy Statement that it will monitor intelligence, feedback and complaints received about how the guidance is being implemented.

**ALI MYNOTT**
Associate, London
**T** +44 (0)20 7264 8294
**E** alison.mynott@hfw.com

1. https://www.hfw.com/Insurance-Bulletin-February-2023


# Financial Services and Markets Bill receives Royal Assent

**The Financial Services and Markets Bill received Royal Assent on 29 June.**

This is the government's flagship Act with which it aims to tailor financial services regulation to the UK market post-Brexit. The Act introduces a secondary objective for the FCA and PRA to facilitate the growth and international competitiveness of the UK economy. It also contains provisions that allow for the reform of the Solvency II regime. We will report in our next edition of the Bulletin on the PRA's consultation on the rule changes that it intends to make to rules and other policy materials in order to implement the reforms.

**WILLIAM REDDIE**
PARTNER, LONDON

**"The PRA cautions against releasing reserves from prior years whilst uncertainty remains over long-term trends."**

# PRA insights into general insurance reserving and capital modelling: warning on inflation

**On 23 June, the PRA published a letter to Chief Actuaries with feedback from its thematic review across the general insurance sector on how firms responded to its previous communication on the effect of general inflation on insurance claims. The PRA is concerned that persistently elevated claims inflation may risk a material deterioration of solvency coverage without mitigating action.**

In summary, the PRA's observations following its review are as follows:

## Adequacy of reserve strengthening

The PRA notes that it has seen a range of claims inflation-related increases applied to reserves, and the average increases may not be sufficient to support future claims in relation to the total economic inflation forecast to pass through the economy. Firms widely acknowledged a lagging effect as inflation passes to claim settlement costs such as higher court settlements, larger compensatory claim settlements, and legal and medical costs. Many firms have yet to see claims inflation reflected in longer-tail business lines, and firms must consider carefully whether such a lag might apply to their business.

## Observations on mitigating benefits to firms' reserves and capital

The PRA cautions against releasing reserves from prior years whilst uncertainty remains regarding long-term trends, or overestimating the benefits of market hardening on recent years due to inappropriate claims inflation assumptions (such as adjusting historical cash-flows to present value).

All firms have benefitted from an increase in the risk-free rate reducing the discounted best estimate technical provisions. The benefit from the fall is greater than the claims inflation allowances applied to technical provisions.

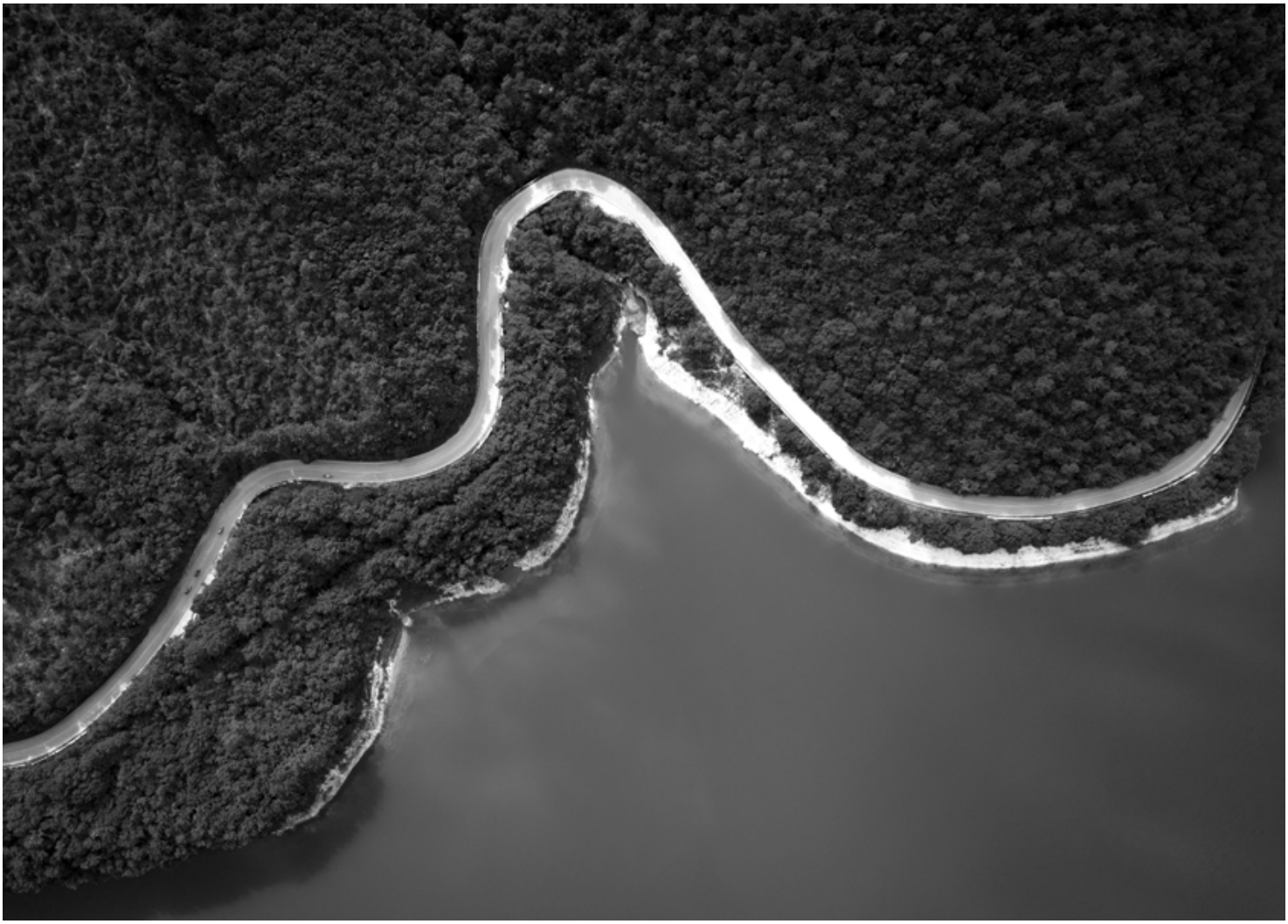
Where claims inflation has yet to be observed in certain classes, there is a risk that firms will underestimate future inflationary impacts and overstate profitability. Underestimating claims inflation assumptions can also lead to a significant effect on the representation of a firm's financial strength. There may be a deterioration in solvency ratios if there is a need to react to claims inflation once it feeds into the data. The PRA states that firms must take pro-active steps to assess the adequacy of their risk management and control frameworks.

## Financial resilience and governance challenges

The PRA considers that there is a significant risk that the market may need to strengthen prior years' reserves in future years and that the 2023 year-end will be more challenging for reserving teams. There should be strong interactions, communication and feedback loops between functions to support reserving teams, and a firm-wide consensus on how much claims inflation is expected to develop and an understanding of how much is already reflected in settlement costs and reserves.

The PRA concludes that it is continuing to monitor how firms are preparing for and allowing for claims inflation in reserves, claims, capital requirements and underwriting/ pricing in line with its approach to supervision document.

**WILLIAM REDDIE**
Partner, London
**T** +44 (0)20 7264 8758
**E** william.reddie@hfw.com



# Greenwashing and insurance – EIOPA interim report

**KATE AYRES**
KNOWLEDGE COUNSEL, LONDON

**"Although EIOPA has not identified any major greenwashing occurrences in the pensions and insurance sectors, it found that cases in other sectors have already created a general mistrust on the part of consumers in relation to sustainability claims."**

**The European Supervisory Authorities[1] (ESAs), including the European Insurance and Occupational Pensions Authority (EIOPA), have been asked by the European Commission (EC) for input on the key features of greenwashing in their relevant sectors. On 1 June, EIOPA published a progress report[2] on potential forms greenwashing in the insurance sector might take, its potential effects, and the current position of regulators. A summary follows below.**

### What is greenwashing?

There is no one generally applicable definition of greenwashing within the EU regulatory framework. However, the ESAs have set out their common high-level understanding of greenwashing as "*a practice whereby sustainability-related statements, declarations, actions, or communications do not clearly and fairly reflect the underlying sustainability profile of an entity, a financial product, or financial services. This practice may be misleading to consumers, investors, or other market participants*".

Greenwashing might occur:

- At entity level (such as in relation to an insurer's strategy or performance);
- At financial product level (e.g. in relation to a product's sustainability strategy or performance); or
- at financial service level (e.g. the integration of sustainability-related preferences into the provision of financial advice).

It may occur at different stages of the business cycle or the sustainable finance value chain.

> “Insurers and pension providers are able to play an active role in their investee companies, moving them towards activities that positively impact sustainability factors.”

## Effects of greenwashing on insurers

The report sets out that misleading sustainability claims can deceive customers into buying products that are not aligned with their preferences, potentially re-routing their premiums from other more sustainable providers. Greenwashing also erodes trust. Although EIOPA has not identified any major greenwashing occurrences in the pensions and insurance sectors[3], it found that cases in other sectors have already created a general mistrust on the part of consumers in relation to sustainability claims. Further, any greenwashing by an insurer would likely damage the insurer's reputation with consequent financial damage and potential litigation. Greenwashing could hinder the provider's solvency if affected products are surrendered en masse, and this could spread through the industry more generally with financial stability implications. There is also the potential that greenwashing will result in regulatory scrutiny and enforcement action.

In addition to the above, greenwashing clearly has the potential to impact insurers through higher claims under third party covers such as professional indemnity and D&O insurance, where greenwashing claims are made against insureds.

## How does greenwashing occur?

EIOPA discusses and sets out a number of examples of potential greenwashing (although noting that no clear conclusions have been drawn at this stage on whether any of these examples definitively constitute greenwashing). Some examples follow below.

### Investment

Insurance and pension providers are large institutional investors with investment strategies that set out goals, ambitions, and how they intend to achieve them. EIOPA notes an increase in sustainability claims relating to investment strategies, such as claiming there is no investment in certain sectors or setting out exclusion criteria for certain types of investments. These claims might be greenwashing where they are misleading, and there may be a temptation to portray investment activities as more sustainable than they are.

Insurers and pension providers are able to play an active role in their investee companies, moving them towards activities that positively impact sustainability factors. This might be achieved, for example, by voting in a shareholder assembly or engaging with senior management at the investee company. However, there could be greenwashing where engagement is not consistent or where engagement policies are not adequately implemented, or there is no genuine dialogue process and escalation strategy.

### Underwriting activities

Some insurers have introduced exclusions in their underwriting (e.g. for activities such as coal mining or fracking). Others have restrictions on corporate clients that breach a certain greenhouse gas (GHG) threshold. Some make exceptions for corporates that the insurer assesses have appropriate transition plans. There may be potential greenwashing, for example, where there is in fact no adequate substantiation of the insured's plans. EIOPA notes that regulatory requirements have been introduced to increase transparency in the form of the Taxonomy Regulation Article 8 and Article 6 of DR 2021/2178 that requires reporting of a KPI measuring taxonomy alignment of underwriting activities.

Where insurers themselves make net-zero commitments with respect to their underwriting portfolio, it is important that these are backed up by credible, timely transition plans.

### Entity management

Greenwashing might occur where unsubstantiated claims are made about the sustainability-related competence of the insurer or pension provider's Board or Senior Management. Employee competence on these issues is also key, especially those that manufacture or distribute products, and incentives or remuneration must not drive the wrong behaviours. EIOPA notes that a poor culture that prioritises profit might lead employees to make misleading claims about product sustainability, to sell more.

### Regulatory reporting

EIOPA notes that reporting around sustainability is growing, including under the Sustainable Finance Disclosure Regulation, Taxonomy Regulation and the Corporate Sustainability Reporting Directive. The same level of rigour will need to be applied here as it is to financial reporting.

### Third party reporting and ratings

EIOPA notes that insurance and pension providers have to rely to some extent on third party data on sustainability to fulfil their reporting obligations. However, the use of misleading third party data spreads greenwashing, and small insurers in particular might struggle to assess the data adequacy. Further, insurers and pension providers often rely on sustainability ratings, which might rate entities or products as ESG-complaint because they would not be affected financially by a natural catastrophe, but may mislead consumers into believing that the product or entity is having a positive effect on sustainability.

### Product manufacturing/ scheme design

Greenwashing may occur where the manufacturer does not consider whether products are aligned with the provider's sustainability strategy or expertise. A provider might also be tempted to exploit consumer interest in sustainable products and related biases, such as by using certain words in a product's name or certain colours in product documents (e.g. "green" or "blue"). It is also difficult to understand and measure sustainability value and so sustainability features may be over-emphasised. Finally, the product provider might fail to ensure the product addresses, over its lifetime, the target market's sustainability-related objectives.

### Sales

Greenwashing might occur where distributors mislead consumers, where there is a lack of training on sustainability features, or where distributors fail properly to assess the suitability of a product for a consumer with sustainability preferences.

### Product/scheme management

Another way greenwashing might occur is in failing to consider how products work in practice. For example, an insurer might state that its claims process is sustainable because it repairs cars where possible, instead of paying for new vehicles, whereas the actual practice on the ground is different.

## Regulatory response

The call for advice also sought input on the supervision of greenwashing risks. EIOPA's responses from national competent authorities (NCAs) noted that many had carried out preventative activity, such as giving guidance to and engaging with the industry, aimed at preventing greenwashing, and some had carried out thematic reviews or surveys. There were challenges encountered by NCAs in this area, such as the fact that assessment of whether insurance products are sustainable is challenging due to unclear, inconsistent regulatory frameworks. Some NCAs have started monitoring advertisements to ensure they are clear and non-misleading. Most NCAs were of the view that their existing and forthcoming mandates, powers, obligations and toolkits would be enough to allow them to monitor and investigate greenwashing and its risks, although some believed these needed to be further developed.

## Conclusion

EIOPA will continue to refine and develop its views on these issues and a final report will be issued in May 2024.

**KATE AYRES**
Knowledge Counsel, London
**T** +44 (0)20 7264 8120
**E** kate.ayres@hfw.com

1. The European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA)
2. **https://www.eiopa.europa.eu/publications/eiopas-progress-report-greenwashing-advice-european-commission_en**
3. The report states that three National Competent Authorities (NCAs) have identified one or more occurrence of greenwashing in their market (relating to insurance and pensions), that five are currently investigating potential occurrences and that 21 have not identified any, due to resource constraints, low supply of products with sustainability features, and because the relevant sustainable finance requirements are new or not fully in force.

**WILLIAM REDDIE**
PARTNER, LONDON

**ANGELA BILARDI**
ASSOCIATE, LONDON

**"This judgment re-iterates the importance for any party acquiring a portfolio of insurance business that they think carefully about what liabilities they could potentially be exposed to and to ensure the contract is carefully drafted expressly to exclude any liabilities they do not wish to be responsible for."**

# DISPUTES

## Whose liability is it anyway? – PA (GI) Ltd v Cigna Insurance Services (Europe) Ltd[1]

**This case concerned a dispute over whether PA (GI) Ltd (PAGI) was entitled to claim under an indemnity for PPI liabilities contained in a Business Transfer Agreement (BTA) and Deed of Warranty and Indemnity (DWI) agreed with Cigna Insurance Services (Europe) Limited (Cigna). It is a reminder, when preparing documents relating to a business transfer, to carry out proper due diligence on the intent and effect of the contracts in relation to previous transactions. It is also another cautionary tale that where contracts are drafted by skilled professionals, the courts will give considerable weight to the language used and will not re-write contracts simply because in hindsight a party entered into a bad bargain.**

### Background

The background to the matter is a series of restructurings that took place in relation to PAGI's life and non-life business over a number of years. PAGI was an RSA subsidiary.

- In 2003, RSA sold certain insurance operations in relation to creditor insurance and certain other products to Cigna as part of a management buyout. At the same time, the BTA was entered into between RSA, Cigna and FirstAssist Group Ltd.
- Subsequently, in 2004, PAGI was sold by RSA to Resolution Life Ltd, which became PAGI's immediate parent.
- In 2005 PAGI's life insurance business was the subject of a Part VII transfer to a company that became known as Phoenix Life Ltd.
- In 2006, PAGI's creditor insurance business was the subject of a Part VII transfer to Groupama. At that time, RSA, Cigna and First Assist Group Limited entered into the DWI.
- Finally, in 2011 another Part VII transfer took place from PAGI to RSA.

PAGI had been the insurer under certain payment protection insurance (PPI) policies sold by a high street retailer from 1991 – 2004. The PPI policies were the subject of complaints of mis-selling to the Financial Ombudsman Service (FOS) which were made after the DWI was entered into. PAGI contended in previous litigation that the liabilities for mis-selling had transferred to Groupama under the 2006 Part VII transfer, but the High Court found, in a judgment of Andrews J in 2015, that this was not the case and they remained with PAGI[2].

### Claim

PAGI sought an indemnity from Cigna under the BTA and/or DWI for redress it had paid to customers following the PPI mis-selling complaints described above.

As a result, it was necessary for the court to consider the documentation relating to the various transactions and transfers outlined above, and their effect.

### Judgment

#### The BTA

The judge, Dame Clare Moulder DBE, addressed the legal principles of contractual construction. PAGI sought to argue that as the contracts had been drafted by skilled professionals, the court should favour the textual analysis approach to contractual interpretation, and should acknowledge that a party may have agreed to something which with hindsight did not serve its interest.

Cigna stressed the need to consider the factual matrix surrounding the contracts and submitted that the principle from *Canada Steamship*[3], that there is an "inherent improbability" of one party agreeing to assume liability for another party's wrongdoing, should be treated as a

useful guide to construction. Cigna contended that clear words would be needed for one party to have agreed to assume responsibility for the negligence of another.

Moulder J stated that, following the Supreme Court's decision in *Triple Point*[4], Cigna set the bar too high when describing the *Canada Steamship* principles as guidance. Instead, Moulder J held that the correct principle is that the Court should bear in mind that a party is "*unlikely to have agreed to give up a valuable right that it would otherwise have without clear words*". Furthermore, it was clear from Lord Leggatt's judgment in *Triple Point* that it is not necessary for express words to be used to exclude negligence.

The indemnity clause in the BTA stated: "*The Buyer shall: (a) assume liability for and indemnify and keep indemnified the Seller or any other member of the Seller's Group against the payment or performance of the Liabilities…and any and all actions, costs, claims, losses, liabilities, proceedings or expenses (including reasonable legal expenses) which the Seller (or other member of the Seller's Group) may suffer or incur in respect thereof*".

"Liabilities" was defined as "*all liabilities of the Business (but excludes the Excluded Liabilities) and "Liability" shall mean any one of them*".

Moulder J held that the language of the indemnity was broad enough to capture liabilities for mis-selling as the indemnity extended to "all liabilities" of the Business. This construction was more consistent with business common sense and was supported by other provisions of the BTA which reflected that the whole of PAGI's business was transferred as a going concern. It was also supported by other documents relating to the transaction, including a reinsurance agreement that provided for reinsurance and indemnity of the seller during an interim period.

The judge rejected arguments that it was inherently unlikely that Cigna would assume responsibility for negligence by PAGI or its agent in the absence of clear wording. However, the judge accepted that the language would not extend to any fraud or dishonesty (although it does not appear that any was alleged).

It was also deemed important that Cigna could have included an exclusion expressly excluding liability for mis-selling, and had not done so, and that it was in the reasonable contemplation of the parties that complaints could be made to the regulator and/or the FOS.

### Effect of 2004 transaction

The judge found that it did not matter that PAGI ceased to be a member of the seller's group in 2004 when it was acquired by Resolution Life. The language of the BTA made clear the indemnities extended to the company "*at the date of the agreement*". Language used elsewhere in the agreement demonstrated that the parties had in mind that the composition of the group might change over time, and the parties could have limited the operation of the indemnity if they wished to do so. This interpretation also made commercial common sense, as it was the subsidiary undertakings at the time of sale that would need continuing indemnity against past liabilities.

### Extent of the indemnity

The judge was also asked to decide whether the definition of liabilities within the BTA meant liabilities as a matter of law, or whether it also extended to reasonable and bona fide settlement of claims, and

whether it extended to payments under the provisions of the DISP sourcebook in the FCA Handbook.

In Moulder J's view, the language of the indemnity was broad and was not restricted to legal liability established in the courts, but would encompass a reasonable and bona fide settlement of claims and complaints. The judge again placed importance on the fact the contract was professionally drafted, and as such, the language of the scope of the indemnity should be given weight.

Favourably for PAGI, it was held the indemnity extended to payments under the provisions of the DISP sourcebook in the FCA Handbook, even in circumstances where PAGI had made payments to customers in the absence of complaints, if payments were made in recognition of PAGI's obligations as a regulated entity. It was held that the word "claims" was capable of encompassing complaints. PAGI's case was always that if it had not offered redress there would have been complaints to the regulator.

Accordingly, PAGI was entitled to be indemnified from Cigna for claims and compensation paid out in respect of PPI mis-selling, pursuant to the BTA.

## The subsequent transfers

Moulder J found that the 2005 scheme transferred from PAGI to Phoenix the mis-selling liabilities attributable to the life business or the life element of composite policies, and the rights to claim under the BTA indemnity also transferred in respect of these elements. Whilst the FOS had been correct to decide that PAGI was the appropriate respondent to complaints about PPI relating to the general business of PAGI following Andrews J's judgment on the 2006 scheme, PAGI should have raised the 2005 scheme with the FCA and FOS and should not have paid out without having done so. Therefore, any settlement relating to the mis-selling of life policies or life component of composite policies was not reasonable and PAGI was not entitled to recover those amounts under the BTA.

The 2011 scheme did not transfer from PAGI to RSA any entitlement to bring a claim under the BTA or transfer the PPI liabilities.

## The DWI

Turning to the DWI, this was confined to matters relating to creditor business and not life or the underwriting of general insurance contracts. The indemnity within it was extremely broad as it referred to "*any and all costs, claims, damages, liabilities and expenses of whatsoever nature arising out of or in connection with…the Creditor Business*" and the mis-selling liabilities were capable of falling within it. The parties were aware of the potential for mis-selling claims as this had been addressed in the Groupama contract.

## Conclusion

This case highlights the court's reluctance to interfere with contractual wording where contracts have been professionally drafted by skilled lawyers. This judgment re-iterates the importance for any party acquiring a portfolio of insurance business that they think carefully about what liabilities they could potentially be exposed to and to ensure the contract is carefully drafted expressly to exclude any liabilities they do not wish to be responsible for.


**WILLIAM REDDIE**
Partner, London
**T** +44 (0)20 7264 8758
**E** william.reddie@hfw.com

**ANGELA BILARDI**
Associate, London
**T** +44 (0)20 7264 8428
**E** angela.bilardi@hfw.com


1. [2023] EWHC 1360 (Comm)
2. Previous HFW briefing here: **HFW-Insurance-Bulletin-3-July-2015.pdf**
3. *Canada Steamship Lines Ltd v The King* [1952] A.C. 192 – Privy Council (Canada)
4. *Triple Point Technology Inc v PTT Public Co Ltd* [2021] UKSC 29

**RUPERT WARREN**
PARTNER, LONDON

**"The Judge found that following the judgment of Butcher J in *Stonegate* (currently under appeal) a decision could in appropriate circumstances be regarded as an occurrence."**

# COVID-19 Coverage cases continue before the courts

**Hot on the heels of the decision of the High Court relating to coverage for "disease at the premises" there have been judgments in two further cases relating to coverage in respect of the consequences of the COVID-19 pandemic. Although these are, in many respects, fact specific, we discuss some of the issues of interest that arose in them below.**

## World Challenge Expeditions Ltd v Zurich[1]

### Background

In this matter, the insured "WCE" was a travel company that provided expeditions worldwide for school students referred to as "challengers". As a result of the COVID-19 pandemic, WCE cancelled nearly all of its booked expeditions for 2020 and refunded the challengers their deposits paid, in accordance with its obligations. These deposits were often paid to WCE by challengers far in advance of travel, and before WCE was itself to pay any third-party providers, such as airlines and accommodation providers. Thus, it was the often the case that WCE had not incurred any irrecoverable third party costs when the deposits were returned.

The issue in this case was whether WCE was able to claim under its group travel policy for the deposits that it had refunded. The insured argued that it was entitled to such cover under the wording since the policy contained an express term covering deposits where a journey was cancelled, and further that the insurer had, over a number of years, always treated the cover as applying to deposit refunds.

### Policy

The policy provided the following cover (so far as is relevant):

*"Cancellation Curtailment Replacement Rearrangement and Change of Itinerary Insurance Section The Cover*

*If the Insured or the Insured Person is forced to*

*A Cancel an Insured Journey*

*B Curtail an Insured Journey …*

*as a direct and necessary result of any cause outside the Insured's or the Insured Person's control the Company will indemnify the Insured for*

*A deposits and advance payments (on a proportionate basis in respect of Curtailment)*

*B charges for transport*

*C charges for accommodation and sustenance*

*D any other charges reasonably and necessarily incurred and that are forfeit under contract or are not otherwise recoverable."*

There was no exclusion for pandemics or infectious disease.

### Judgment

### Policy coverage

The Judge, Mrs Justice Dias, noted that in addition to WCE, individual challengers were expressly identified as insureds in the policy, there was a large aggregate deductible that applied to claims, and that there were two sets of bookings and movement of money, those made by the challengers and those made by the insured with third party providers.

It was held that the natural meaning of the policy was that, in order to be covered, "deposits" had to be forfeited and irrecoverable by the person who had paid them. Here, the deposits were not irrecoverable by the challengers since they were refunded. From the point of view of WCE, the wording of the cover extended only to WCE's own irrecoverable costs. As such, under the terms of the policy, it was only covered for refunds of sums which it had itself paid to third parties and could not recover, up to the amount of refunds it was obliged to make to challengers.

However, the Judge went on to find that insurers were estopped by convention from denying cover for a proportion of WCE's claims. A large number of claims in respect of deposit refunds to challengers by WCE had been agreed by insurers under previous policy years and these claims had been set against the deductible. The Judge held that

it had been a common assumption between the parties that WCE was covered for these deposit refunds. There had been detrimental reliance on this assumption by WCE as it had delayed cancelling trips departing after 31 May 2020, until 20 April 2020, whilst the position was discussed with insurers. This had deprived WCE of a real chance of exploring other options to preserve its customers' goodwill. Therefore, an indemnity was due under the policy in relation to the deposits refunded for trips cancelled on that date departing from 1 June – 31 August 2020, subject to WCE giving credit for any recoveries that it had been able to make from third parties.

**Aggregation**

The policy contained a Cancellation/ Curtailment Limit of £100,000 in respect of all claims "*for loss and expense arising out of any one event.*" "*Event*" was defined as a "*sudden, unforeseen and identifiable occurrence*" with provision for separate occurrences to be treated as a single occurrence where they arose from or were attributable to one source or original cause and occurred within a 10 mile radius and 72 hours of that source/cause.

WCE argued that the claims did not arise out of one event but from the pandemic as a whole, the spread and prevalence of COVID in departure and destination countries and the actual and anticipated government restrictions, such that it was not possible to isolate particular occurrences as the cause of particular cancellations.

The insurers argued that the claims did aggregate by reference to one of: the imposition of exit travel restrictions in each departure country; or imposition of entry travel restrictions in each relevant destination country; or WCE's decision to cancel the trips on 20 April 2020 or multiple decisions to cancel within a 72 hour period in implementation of that decision.

The Judge found as follows:

The 20 April decision to cancel arose from an earlier decision taken in mid-March, which was based on an assessment of the situation holistically. The decision was not acted on in March because of the insurer's reluctance to permit cancellations more than 60 days ahead. This overall situation could not be said to be an identifiable occurrence, but a state of affairs contributed to by a number of interrelated factors. However, the Judge found that in principle, effect could still be given to an aggregating factor, where there was a strong enough causal connection between a particular occurrence and the losses, even if the losses might be said to have arisen from a a state of affairs and/or other occurrences.

The Judge accepted that that the imposition of exit or departure restrictions in a particular country was capable of being an occurrence, but this did not meet the requirements of this particular policy wording as it required that an event must be sudden and unforeseen. It was held that by April 2020, the restrictions, even if sudden, were not unforeseen. Furthermore, the decision did not arise from a particular set of restrictions, but was a blanket decision to cancel all future trips given the prevailing global state of affairs.

The Judge stated on an obiter basis that the position may have been different in respect of trips cancelled as a result of particular regulations which had been due to depart within the next 2-3 weeks (such as UK government advice in mid-March 2020 against overseas school trips), but this might not be true for more distant departures where there was still a prospect in mid-March or April 2020 that they might go ahead. It was suggested that this situation was distinguishable from that in *Stonegate*[2] and that in any event the insurers had themselves refused to accept that mid-March restrictions were sufficient reason to cancel trips more than 60 days ahead.

Turning to whether WCE's decision to cancel could be an aggregating factor, the Judge found that following the judgment of Butcher J in *Stonegate* (currently under appeal)[3] a decision could in appropriate circumstances be regarded as an occurrence and this was ultimately a question of judgment.

However, the Judge held that it could not have been the intention of the parties that the insured's own decisions could be capable of constituting relevant occurrences since they were not fortuitous. Further, it was highly unlikely that the insured's own decision could also have been said to have been sudden or unforeseen from the perspective of an informed observer in the position of the insured. If the contrary was the case, the insured could feasibly engineer multiple separate occurrences by documenting a separate decision in respect of each individual trip.

Therefore, the Judge concluded that the aggregating provision did not operate in this case to reduce the claim. The cancellations arose from the overall situation which was not an occurrence under the policy.

We understand that an application for permission to appeal has been made in this case.

## Bellini v Brit[4]

In this matter, the court considered whether the particular policy wording responded to COVID-19 pandemic losses, or whether the cover required physical damage in order to trigger, and found in favour of insurers.

**Policy wording**

The policy contained "Cover extensions" including:

"**Murder, suicide or disease**

***We*** *shall indemnify you in respect of interruption of or interference with the business caused by* ***damage****, as defined in clause 8.1, arising from:*

*a) any human infectious or human contagious disease …. an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the* ***premises*** *or within a twenty five (25) mile radius of it…."*

Damage was defined in clause 18.16.1 as "*physical loss, physical damage, physical destruction*"

**The judgment**

The issue was whether physical damage was required for the insured restaurant business to make a claim under the business interruption cover for the losses it had suffered during the COVID-19 pandemic.

The insured argued that the overall scheme of the policy was for basic cover tied to physical damage, and the reasonable intention of the parties in the extension was to extend

the cover beyond this. The insured claimed that it was significant that the extension did not refer to the definition of damage in 18.16.1, but rather back to a clause providing for the whole machinery of the cover. It was also argued that if physical damage was required under the clause, then it would render any cover illusory, and negate the purpose of providing cover for notifiable disease manifesting 25 miles away.

Ms Clare Ambrose (sitting as a Deputy High Court Judge) considered the question of construction of the policy. The Judge held in short order that the relevant clause was clear and provided no cover in the absence of physical loss, damage or destruction.

There was no inconsistency in different parts of the policy or how "*damage*" was used throughout. It was of limited weight that the cover was described as an "*extension*", and this section was in any event automatically included in the policy as standard with no additional premium. Further, the parties had expressly agreed the headings were not part of the policy.

The claimant highlighted that the FCA COVID-19 Test case[5], as well as *Corbin & King*[6] had made clear that the court must decide the parties' intentions in the policy language from the point of view of a reasonable SME owner and not approach it with the minute textual analysis of a pedantic lawyer. However, the Judge held that a reasonable SME (with or without a broker) would have understood the meaning of "*damage*" within this policy to mean physical damage. It was an agreed fact that at the time the policy was entered into non-damage cover would have been available, and the insured's broker could have advised on obtaining that. The Judge also noted that, as set out in *Lewinson on Contracts*, it would be highly unusual to depart from an express contractual definition of a word.

Finally, it was not the case that the cover provided by the extension was illusory, as the Judge held that it would plainly provide some cover beyond the basics (for example other parts of the clause covering vermin or pests would respond to a closure where rats damaged electrical wires). The Judge held that a manifestation of a notifiable infectious disease or a murder on the premises would be capable of causing physical damage. The manifestation off the premises would be less likely to cause physical damage but its inclusion reflected the impact of a notifiable disease and its limited application did not justify changing the meaning of a defined term.

The Court therefore concluded that there was no cover in the absence of physical damage.

### Conclusion

These two decisions on policy coverage largely turned on their own facts. The discussion of aggregation issues is of particular interest, although we await the appeal in *Stonegate* due to be heard at the end of this year, as well as the appeal in *World Challenge Expeditions*. It is clear that issues relating to COVID-19 are continuing to come before the courts. As well as the *Stonegate* appeal. later this year we also expect a further hearing in relation to denial of access cover in which *Gatwick Investments* is the lead matter. Insurers and insureds alike continue to watch this space.

**RUPERT WARREN**
Partner, London
**T** +44 (0)20 7264 8478
**E** rupert.warren@hfw.com

1. [2023] EWHC 1696 (Comm)
2. [2022] EWHC 2548 (Comm)
3. Also considered in *Sky UK v Riverstone* – see our briefing **here**
4. [2023] EWHC 1545 (Comm)
5. [2021] UKSC 1
6. [2022] EWHC 409 (Comm)

## Raise the Roof! Court considers policy coverage for the costs of remediating Sky's roof

**The Court has recently handed down judgment in *Sky UK Ltd v Riverstone Managing Agency Ltd and others*, which concerned a number of key issues under a Construction All Risks (CAR) policy.**

This arose from the construction of in 2014 – 2015 of "Sky Central" the global headquarters of Sky. The judgment concerns policy coverage issues including: the extent of coverage for Mace; cover for damage occurring after the period of insurance; the meaning of damage; and issues of aggregation. We discuss the case further in our briefing **here**.

**HFW has over 600 lawyers working in offices across the Americas, Europe, the Middle East and Asia Pacific. For further information about our Insurance and reinsurance capabilities, please visit www.hfw.com/Insurance-Reinsurance-Sectors.**



Americas | Europe | Middle East | Asia Pacific